

U.S. BANKRUPTCY COURT  
District of South Carolina

Cases Number: 08-00599 and 08-00604

ORDER ON MOTION FOR THE DETERMINATION OF SINGLE ASSET REAL  
ESTATE STATUS AS DEFINED BY 11 U.S.C. § 101(51B)

The relief set forth on the following pages, for a total of 6 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**06/20/2008**



Entered: 06/23/2008

US Bankruptcy Court Judge  
District of South Carolina

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

IN RE:

Harmony Holdings, LLC,

Debtor(s).

C/A No. 08-00599-DD

Chapter 11

IN RE:

Spanish Moss Development, LLC,

Debtor(s).

C/A No. 08-00604-DD

Chapter 11

**ORDER ON MOTION FOR THE DETERMINATION OF SINGLE ASSET REAL  
ESTATE STATUS AS DEFINED BY 11 U.S.C. § 101(51B)**

THIS MATTER is before the Court on motions filed by R. E. Loans, LLC, a creditor in these jointly administered cases. RANBAT, LLC joined in the motion as to Harmony Holdings, LLC. The motions were heard in connection with the motions of the two Debtors to substantively consolidate the bankruptcy cases. The motions to substantively consolidate the cases were withdrawn, with the consent of the objecting parties, after the hearing. R. E. Loans, LLC relied on the evidence presented in connection with the substantive consolidation motions and asked the Court to consider two monthly operating reports for each Debtor as its case for a finding that these are single asset real estate cases for the purposes of 11 U.S.C. § 362(d)(3).

The parties paint a widely different gloss on the statutory language. Debtor urges the Court to limit the scope of single asset real estate cases to debtors with a single building or parcel, on which there is a single lien (essentially a two party dispute with no or few other creditors), and which generate only the most passive type of income, i.e. rent collected without the provision of any service other than permitting occupancy. Creditor

urges the most broad reading, suggesting that a case with real estate that generates most of the gross income is a single asset real estate case and that the gloss of the case law looking to the existence of a separate business establishment located on the real estate should be rejected since the presence of any business on the land is necessarily incidental to the land. Both readings, and perhaps much of the case law, unduly ignore a fairly straight forward definition.

The Bankruptcy Code provides “[t]he term ‘single asset real estate’ means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.” 11 U.S.C. § 101(51B).

Three requirements emerge from the definition of "single asset real estate" (SARE) in 11 U.S.C.S. § 101(51B) which must all be met for a debtor to be considered a SARE debtor: (1) the debtor must have real property constituting a single property or project (other than residential real property with fewer than four residential units), (2) which generates substantially all of the gross income of the debtor, and (3) on which no substantial business is conducted other than the business of operating the real property and activities incidental thereto. If a debtor fails to meet any prong, it is not a SARE.

*AD HOC Group of Timber Noteholders v. Pac. Lumber Co. (In re Scotia Pac. Co. LLC)*, 508 F.3d 214 (5th Cir. Tex. 2007).

These Debtors own real property and improvements that are a single project, known as Harmony Township. Harmony Township is a planned unit development designed by Duany Plater-Zyberk & Company in the new urban style. The real property

is a single project despite the fact that it was acquired as several tracts of land, has been partly developed, and is owned by two entities<sup>1</sup>.

The real estate and its improvements generated substantially all of the gross income of the Debtors during the two months that the Court reviewed. The Debtors provided no other evidence as to income. The fact that little or no income is generated during this time period is of little or no consequence in terms of meeting the test for the definition of single asset real estate. *See In re Kinard*, C/A 01-03621, (Bankr. D. S.C., November 21, 2001). The other funding for operation of the Debtors was from capital contributions and the use of a letter of credit that are not income. The income of the Debtors is from the real estate.

The final factor, and the fulcrum of all the reported cases, is whether substantial business is conducted on the real property other than the business of operating the real property and activities incident thereto. The Debtors presented evidence of what would be done in the future if the cases were consolidated and the Debtors allowed time to reorganize. There was some testimony from a member of the entity that owns these Debtors concerning repair and infrastructure work that is ongoing, using funds from a bond posted with the county government. There was no evidence of any separate business activity on the property. The activity relates only to repairing, improving and developing the real property.

Courts have analyzed various types of businesses in determining the “substantial business” component of the single asset real estate definition. In *In re Kkemko, Inc.*, 181

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<sup>1</sup> The undisputed evidence is that Spanish Moss Development, LLC, although the owner of certain permits, the marina and remaining boat slips, several lots and cottage sites, cottages and a small tract of land, does no business and that all the functions and responsibilities of ownership are conducted through Harmony Holdings, LLC.

B.R. 47, 50 (Bankr. S.D. Ohio 1995) the debtor operated a marina. The Court found that the marina in that case was “something more than [the] rental of moorings. [Rather][i]t stores, repairs, and winterizes boats. The marina provides showers and a pool, as well as other activities for those boaters who use it to moor their boats. It sells gas. . . . Other amenities such as concessions also produce revenue for the debtor from the operation of the marina.” *Id.* There is a “marina” on the Spanish Moss Development, LLC property in this case but there is no evidence that any business takes place there. The only evidence presented was that in order to have a boat slip at the marina one must own property in Harmony Township. The “marina”, at present, is a collection of boat slips.

The case most on point is *Kara Homes v. National City Bank (In re Kara Homes, Inc.)*, 363 B.R. 399 (Bankr. D. N.J. 2007) where the Court concluded that the real estate developments in those cases met the definition of single asset real estate despite the activities of acquiring developable land, obtaining permits and zoning changes, designing and building improvements to the property and marketing and selling the homes. This is precisely the activity undertaken by the Debtors in the present case. The Court in *In re Scotia Pacific Co., LLC*, 508 F.3d 214 (5<sup>th</sup> Cir. 2007), in discussing *Kara Homes*, opines that “[t]he construction and sale of homes (and the land on which they are built) is within the traditional scope of the SARE definition.” *Scotia*, at 223)

The third prong of the inquiry, whether substantial business is conducted other than the business of operating the real property seems, in most of the cases, to turn on the issue of whether the income from the property is passive – such as from collecting rents and from the sale of housing units, or requires the employment of others and interaction with a larger community – such as in the case of a hotel with a restaurant or a golf course

with an active pro shop. There is no evidence of business activity on the real property owned by these Debtors other than repairing, improving and developing the property and the rental of housing units. There are no shops and no sales of the products of the land to the public. Nothing takes us outside the scope of the definition of single asset real estate.

The real property of the Debtors under lien to R. E. Loans, LLC and RANBAT, LLC falls within the definition of single asset real estate and the Debtors are subject to the terms of 11 U.S.C. § 362(d)(3).

**AND IT IS SO ORDERED.**

Columbia, South Carolina

June 20, 2008